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Supreme Court, U. S.
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In the Supreme Court
of the United States

OCTOBER TERM 1972

No. 72-1288

UNITED PACIFIC INSURANCE COMPANY,
Petitioner,

v.

DISCOUNT COMPANY, INC., a corporation, RICHARD R. NORELIUS, PHYLLIS L. NORELIUS, ELIM E. NORELIUS and AGNES NORELIUS,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondent prays that this Court deny the petition for writ of certiorari to review the judgment and an opinion of the United States Court of Appeals for the Ninth Circuit that vacated for lack of jurisdiction that part of the judgment of the District Court attributable to more than the original use of plaintiff's claim and the costs and attorneys fees allocable thereto.

QUESTIONS PRESENTED

1. Did the District Court lack jurisdiction to consider the claims of third-party plaintiff beyond that which sought indemnification for the claim of the original use plaintiff?

2. Has the Court of Appeals for the Ninth Circuit limited ancillary jurisdiction in irreconcilable conflict with the decisions of the other Circuit Courts of Appeals?

3. Has the Court of Appeals for the Ninth Circuit limited Federal Court jurisdictional concepts of "judicial economy, convenience and fairness to litigants" in conflict with the decisions of the United States Supreme Court and of the First and Second Circuits?

STATEMENT OF THE CASE

Stanton W. Payne furnished equipment and labor to respondent, Discount Co., Inc., a Washington corporation, for work in Oregon by Discount under a contract dated May 20, 1968, with the United States Department of Agriculture Forest Service at the Mona Campground Lookout Boating Site (Mona Project). Pursuant to the Miller Act, 40 U.S.C. § 270(b), Payne sued United Pacific Insurance Co. (United), a Washington corporation, who was surety for Discount on the performance and payment bonds for that project. On August 8, 1967, Discount, its president, Richard R. Norelius, and his wife, Phyllis L. Norelius, had entered into a general indemnity agreement with United Pa-

cific covering all liabilities and attorneys fees incurred by United under the bonds posted for Discount. United Pacific had also posted similar bonds for another separate campground project, the North Waldo Campground (Waldo Project). Stanton W. Payne did not furnish equipment or labor to Discount Co., Inc., on the Waldo Project. Stanton W. Payne brought suit against United Pacific on the performance and payment bonds for the Mona Project only. United Pacific impleaded Discount and the Noreliuses as third-party defendants and sought specific performance of an indemnity agreement entered into on August 8, 1967, covering all liabilities and attorneys fees incurred by United Pacific under the performance and payment bonds on both the Mona Project and the Waldo Project. In April, 1970, ten months prior to the trial, United Pacific settled Payne's claim for $2,162.40.

REASONS FOR DENYING THE WRIT

I

Did the District Court lack jurisdiction to consider the claims of third-party plaintiff beyond that which sought indemnification for the claim of the original use plaintiff?

Throughout this case from the trial stage through the appeal to the Court of Appeals for the Ninth Circuit, petitioner has consistently taken the position that they were entitled to full indemnity against respondents on a single indemnity agreement. This over-simplification totally ignores the factual basis for the re-

versal by the Ninth Circuit Court of Appeals, and also demonstrates the misunderstanding the petitioner has been laboring under since the trial of the original action in Federal District Court for the District of Oregon. The claim of the original use plaintiff, Stanton W. Payne, was filed against United Pacific on a payment bond for work paid and performed as a subcontractor on the Mona Campground and Lookout Boating Site. The claim of petitioner, United Pacific, against the prime contractor as third-party defendant, was based upon specific performance of an indemnity agreement in between the two respective parties involving two federal campground projects, and the amounts expended by United Pacific on two performance bonds and the two payment bonds. United Pacific's third-party claim was approximately 72 times greater than the amount of the original claimant, Stanton W. Payne.

Petitioner cites Rule 14(a) of the Federal Rules of Civil Procedure, which states as follows:

> "At any time after commencement of the action, a defending party, as a third-party plaintiff, may cause summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. . . ."

Rule 14(a) does not provide for recoveries in excess of the original use plaintiff's claim. Every case cited by petitioner in which a third-party plaintiff exerts a claim in excess of that sought by the original use plaintiff, either diversity of citizenship or a federal

question is present as an independent basis of jurisdiction; or the same transaction or occurrence, or operative set of facts is involved as in the original use plaintiff's claim.

The principal issue involved in the Ninth Circuit Appeal involved the policy determination by that court as to the scope of ancillary jurisdiction as applied to third-party claims. The decisions applicable reveal that the third-party claim must arise from the same aggregate or core of facts, or the same transaction(s) or occurrence(s), with the guiding principle being avoidance of time-consuming and costly reduplication of evidence and issues of separate actions on each claim. The cases cited by petitioner and the cases cited in the following brief all support the position that the proper use of ancillary jurisdiction is in connection with third-party claims involving the "liability over" situation in which the third-party defendant may be liable for all or part of the original plaintiff's claim against the original defendant. All decisions supporting claims by third-party plaintiffs which exceed an amount of that of the original plaintiff are limited to cases in which the third-party plaintiffs sought additional damages or lost profits which arose from the same aggregate or core of facts.

The classic example of ancillary jurisdiction and the liability-over situation is presented in *Schwab* v. *Erie Lackawanna Railroad Company*, 438 F.2d 62 (3rd Cir. 1971), as all issues in the *Schwab* case evolved from the same train-truck collision, and the court held that the original defendant railroad was en-

titled to indemnity from the third-party defendant as he may have been liable for all or part of the use plaintiff's claim against the original defendant. The court in *Schwab* states:

> ". . . we, too, must reject the view that Rule 14 permits recovery of damages in excess of, or different from that sought by the original plaintiff in his main claim." (Ibid at p. 68).

In *Schwab* the court cites Fraser, "Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts," for the proposition that:

> ". . . the purpose of Rule 14 is to avoid the cost of two actions involving the same evidence." 438 F.2d 62, at 70).

This statement illustrates the basic ancillary jurisdiction defect in the case at bar. As stated before, the original plaintiff's claim against United Pacific on a payment bond posted for services and equipment furnished on the Mona Lake Campground, involved vastly different evidence and issues than the third-party claim by United Pacific against Discount and the Noreliuses. The third-party claim was brought on a separate indemnity agreement between United Pacific and the Noreliuses and involved two separate projects. Instead of simplifying the issues and avoiding a duplication of evidence if tried with the original claim by Stanton Payne, the third-party claim involving United Pacific, Discount, the Noreliuses and Earl Angell, would have severely complicated the original plaintiff's claim which was settled seven months prior to trial. Neither diversity of citizenship nor federal

question jurisdiction independently supported the third-party claim.

It is critical to note that the same core of facts are not present in the original use plaintiff's claim as are present in the third-party claims of United Pacific. The issues presented by the claim of the original use plaintiffs' complaint were limited to the following:

(1) Proof that Discount had entered into a contract with the Forest Service to construct Mona Campground and Lookout Boating Site;

(2) Proof that Stanton W. Payne had entered into an agreement with Discount to supply equipment and operators to be used on the project;

(3) Proof that Discount furnished a payment bond to the United States as surety for the persons supplying labor and materials on the project;

(4) Proof that plaintiff provided equipment and labor in the agreed and reasonable value of $1754.00; and

(5) Proof that plaintiff made demand and filed proof of loss on defendant.

In the third-party claim brought by United Pacific, a different core of facts was involved. The issues included the following:

(1) Proof of a separate indemnity agreement between United Pacific, Discount and the Noreliuses involving both federal campground projects;

(2) Whether the two federal projects were term-

inated at the government's convenience or through the fault of Discount;

(3) Whether United Pacific was estopped to assert a claim because of certain representations made to the Noreliuses that they would not take over the projects;

(4) Proof of alleged kick backs and improper conduct involving Mr. Norelius, his parents, and Earl Angell; and, ,

(5) Many other disputes of fact appearing in the trial record which would not have duplicated evidence in the trial of the original plaintiff's claim. A cursory examination of the transcript in the instant case demonstrates that the third-party plaintiff claim by United Pacific would not involve a mere duplication of evidence that would have been produced in the original plaintiff's claim.

A very analagous fact situation is presented by *United States Fidelity and Guaranty Company* v. *American State Bank et al*, 372 F.2d 449 (5th Cir. 1967), where the original action was brought under the Miller Act by the United States for the use and benefit of Flint Steel Corporation, a sub-contractor, against a prim contractor, on a federal project. The United States Fidelity and Guaranty Company was joined as a party defendant as surety on the Miller act bonds required of the prime contractor for both payment and performance. The surety filed a third-party complaint for actual and punitive damages against the prime contractor for funds expended by

the surety under the requirements of its performance bond. The third-party complaint was based upon a claim that the prime contractor had presented totally false financial statements that induced the surety to issue its surety bond. The Court held as follows:

> "The original suit is on a payment bond. The third-party complaint is for indemnification for losses on a performance bond. Under the Miller Act these bonds represent separate obligations running to separate obligees; to persons supplying material and labor in the case of the payment bond, and to the government of the United States in the case of the performance bond. Here, regardless of the success or failure of the use-plaintiff's cause, the appellant surety's claim against the appellees will persist as an entirely independent claim. The fact that the third-party claim arises against the same general background as the main claim is not enough to allow application of Rule 14 to independent claims." *Ibid.* at 450.

In another case very similar to the one at bar, the use-plaintiff, as a sub-contractor and materialman, was suing the general contractor and his surety for materials and services rendered. Jurisdiction was based on the Miller Act. The third-party action, in equity, involved issues of whether the contractor's surety was estopped from asserting against a bank, its superior rights to a fund owing from the government. Held:

> "These separate claims require dissimilar evidence. . . .
>
> "It is true, as the surety argues, that if both

the surety and the use-plaintiff succeed, the surety may use the fund to satisfy in part the use-plaintiff's judgment. However, this tenuous thread linking the two actions is not sufficient to support the policy considerations underlying Rule 14. . . .

"Here it is apparent, however, that the operative facts which give rise to the use-plaintiff's claim are entirely *independent and disparate* from the transactions which are determinative of the third-party action." (Emphasis supplied) *U. S. for the use and benefit of Louis Ricci* v. *Russell Construction Company*, 38 F.R.D. 467, 468 (D. Conn. 1965).

In *Lasa Per L'Industria Del Marmo Societa Per Azioni* v. *Alexander et al*, 414 F.2d 143 (6th Cir., 1969), a supplier brought the principal action against the prime contractor, its surety, sub-contractor, and the City of Memphis, and the Court found that the complaint, the two counterclaims, the sub-contractor's cross-claim against the co-defendants, the sub-contractor's third-party complaint against the architect, and the prime contractor's cross-claim against the sub-contractor *all* involved basically the same factual or legal issues and that there was a logical relationship among all the claims as all related "*to the same project* and to the problems arising out of the marble used in the erection of the Memphis City Hall." (Emphasis supplied). In the case at bar, all the issues did not relate to the same project, but involved the construction of two separate campground projects.

HAS THE COURT OF APPEALS FOR THE NINTH CIRCUIT LIMITED ANCILLARY JURISDICTION AND IRRECONCILABLE CONFLICT WITH THE DECISIONS OF THE OTHER CIRCUIT COURTS OF APPEALS? Petitioners cite the case of *Milwaukie Construction Company* v. *Glens Falls Insurance Company*, 367 F.2d 964 (9th Cir., 1966), for the proposition that the District Court properly exercised ancillary jurisdiction in the case at bar. The *Milwaukie Construction* case offers no jurisdictional argument to the petitioners as Glens Falls was a New York corporation and the defendants were citizens of Oregon. Therefore, federal jurisdiction based upon diversity of citizenship was present. In the present case, the third-party plaintiff, United Pacific Insurance Company, was a citizen of the state of Washington, as were the third-party defendants. The indemnity agreement did not provide federal question jurisdiction.

Petitioners also take the position that the case of *Ruckman and Hansen, Inc.* v. *Contracting and Material Company*, 328 F.2d 744 (7th Cir., 1964) is in conflict with the Ninth Circuit ruling in the case at bar. The important distinction, of course, is that Ruckman and Hansen involved only one surety bond on two highway projects. The original plaintiff in that case worked on both overpasses involved. For that reason, all claims arose out of the same transaction or occurrence and involved claims paid by the surety on the same bonds as set forth in the original pleading. A single group or core of operative facts was present.

Noland Company v. *Graver Tank and Manufacturing Company*, 301 F.2d 43 (4th Cir. 1962), presents a fact situation in which the third-party complainant was allowed to recover damages in excess of that sought by the original use plaintiff. In *Noland* the general contractor brought action against the sub-contractor for the difference between the actual cost of the water tank and the sub-contractor's original bid price. The sub-contractor filed a third-party complaint against the sub-contractor's water tank supplier for the amount of the sub-contractor's liability to the general contractor, and in addition the profit which the sub-contractor contemplated on the supplier's original bid price. The Fourth Circuit Court held that the addition of the $4,000.00 profit issue did not in any way complicate the original claim, as it grew out of the same transaction involved in the original action. The Court pointed out that ancillary jurisdiction should not be exercised if it would unduly complicate the original action. In the instant case, the two separate performance bonds, and two separate payment bonds were involved on two separate projects, one of which the original use-plaintiff never furnished services or materials in connection with.

Also interesting to note, is the fact that the Court in *Noland*, had complete diversity of citizenship, and thus had an independent base of federal jurisdiction. The original plaintiff, Ruscon Construction Company, was a South Carolina corporation, Noland Company, Inc., was a Virginia corporation, and Graver Tank and Manufacturing Company was a Delaware corporation. It appears that the federal Court would have

been the proper forum for the claim for lost profits even if it had been brought separately. In the case at bar, United Pacific would have necessarily been required to pursue its claim for indemnity in the state court as neither diversity nor federal question were present.

The petitioner's frequent references to their right to "indemnity," ignores the fact that no issues were present in the original use plaintiff's claim as to indemnity. In fact, no issues were presented in the original use plaintiff's claim that even vaguely were connected with the North Waldo project. Petitioner takes the position that a sufficient "logical nexus" was present in the case at bar. The fact that the third-party claim arises against the same general background as the main claim is not enough to allow application of Rule 14 to independent claims. *United States Fidelity and Guaranty Company* v. *American State Bank et al, Ibid.* at 450. It is apparent that the third-party claim of United Pacific would introduce new and distinct matters into the trial of the claim of the original use plaintiff. Petitioner's statements that the doctrine of ancillary jurisdiction is "amorphous" *Lesnik* v. *Public Industrials Corporation*, 144 F.2d 968 (2nd Cir. 1944), and incapable of exact definition, *Walmac Company* v. *Isaacs*, 220 F.2d 108, 113, 114 (1st Cir. 1955), adds very little to the issues presented. Rule 82 of the Federal Rules of Civil Procedure provides as follows:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States Dis-

trict Courts or the venue of actions therein. . . ."

The Second Circuit in *United States for the use and benefit of D'Agostino Excavators, Inc.* v. *Hayward-Robinson Company*, 430 F.2d 1077 (2nd Cir. 1970), found the jurisdiction existed independently as compulsory counter-claims were involved in that case. No such claims are involved in the case at bar. The issue involved was whether the counter-claims in question were either compulsory or permissive. The counter-claims were found to be compulsory as they arose out of the same transaction or occurrence as the original claim. The two jobs (federal and non-federal) were treated by the parties as being indivisible as no apportionment of the payments to the sub-contractor were made. In the case at bar, Stanton W. Payne had absolutely nothing to do with the North Waldo project in any way.

First National Bank of Cincinnati v. *Pepper*, 454 F.2d 626, 635 (2nd Cir. 1972), involved a statutory interpleader action brought by the bank against Pepper and others. The statutory power provided by 28 U.S.C. 1335 gave the District Court in that action power to effect its decrees by staying state court actions involving the same res. The fact that the Court in that case forced Pepper to file his complaint in Federal Court, offers little, if any, consolation to petitioners under the instant fact situation.

Petitioners also cite *Compton-Richmond Company, Inc., Factors* v. *United States of America*, 273 F. Supp. 219, 221 (S.D. N.Y. 1967). In that case, the

aintiff corporation brought an action against the nited States to recover taxes paid as a penalty. The vernment sought to enjoin officers of the bankrupt rporation who had failed to collect and pay federal thholding and employment taxes. It is distinguish-le from the case at bar in that testimony of the rd-party defendants was vitally important to the judication of the original plaintiff's claim, and no w or time consuming evidence was involved. All ims arose out of the same transaction (failure to y taxes), and evolved around determining who, or at corporation, was a "responsible person." This uld undoubtedly avoid reduplication of evidence and tain consistent results from identical or similar evi-nce. But this policy consideration is not present in r case.

Revere Copper and Brass, Inc. v. *Aetna Casualty Surety Co.*, 426 F.2d 709 (5th Cir. 1970), is com-tely consistent with the position taken by respond-ts at the time of trial and during the appeal taken the Ninth Circuit. The holding in *Revere* simply tes that a Court which has jurisdiction over the gregate of facts which constitute the plaintiff's im, needs no additional ground of jurisdiction to termine the third-party claim which comprises the me core of facts. As stated before, it is respondent's sition that the same aggregate or core of facts was t involved in the claim of United Pacific against spondents in the action below.

HAS THE COURT OF APPEALS FOR THE

NINTH CIRCUIT LIMITED FEDERAL COURT JURISDICTIONAL CONCEPTS OF "JUDICIAL ECONOMY, CONVENIENCE AND FAIRNESS TO LITIGANTS" IN CONFLICT WITH THE DECISION OF THE UNITED STATES SUPREME COURT AND OF THE FIRST AND SECOND CIRCUITS? This Court, in *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966), held that the claim of Gibbs was "a case where two distinct grounds in support of a single cause of action" was present. The fact that a state claim also formed part of Gibb's cause of action allowed that claim to be "pendant." But *United Mine Workers* v. *Gibbs*, cannot be readily compared with the case at bar. Obviously, United Pacific's claim for indemnity was not part of Payne's "cause of action." No federal issues were present in the indemnity agreement as it did not come within the scope of the Miller Act. *United Mine Workers* v. *Gibbs* also points out ". . . if the federal claims are dismissed before trial . . . the state claims should be dismissed as well" p. 726. In the case at bar, the Payne claim was settled seven months prior to trial for a total of $2,162.40. The claim of United Pacific that originally sought to have third-party defendants place collateral security, resulted in a judgment of $145,777.67, and $25,000.00 in attorney's fees for a total of at least seventy-two times greater than the claim of the original use plaintiff.

Dugas v. *American Surety Co. of New York*, 300 U.S. 414, 57 S. Ct. 515, 81 L. Ed. 720 (1937) con-

sisted of an interpleader suit brought under a federal statute. In that case a temporary and permanent injunction of a State Court proceeding were sought. Diversity jurisdiction was also present. Close analysis of the facts in *Dugas* demonstrates that this holding is not persuasive in the case at bar.

Petitioner's contentions that the exercise of ancillary jurisdiction is "discretionary," ignores the fact that this Court's holding in *Gibbs*, applies to the joinder of a federal and a non-federal claim under pendant jurisdiction. In *Gibbs* the parties are already before the Court on the federal claim, and the addition of the state claim is allowed merely because it is part of the plaintiff's original cause of action. In the case at bar, the indemnity agreement relied upon by United Pacific is certainly not part of the original use-plaintiff's cause of action, and additional projects and bonds were involved that would not be present in the original use plaintiff's claim.

CONCLUSION

The third-party claim of the original defendant, United Pacific, relies upon neither diversity of citizenship, nor upon the presence of a federal question to vest the District Court in the action below with federal jurisdiction. Trial of this third-party claim without the original use plaintiff would serve none of the useful purposes for which ancillary jurisdiction was designed, and does not meet the jurisdictional requirements of ancillary jurisdiction for the following reasons:

(1) It did not arise from the same aggregate or core of facts, or the same transaction(s), or occurrence(s), present in the original plaintiff's action as pointed out in the case discussed infra;

(2) Its trial with the original plaintiff's action would not avoid time consuming and costly reduplication of evidence, as each involved completely separate agreements and different obligees and obligors; and

(3) By no means involved the simple "liability over" on situations present in the cases cited by petitioner, and amounts to, in fact, a bootlegging of a state claim (72 times greater than that of the original plaintiff) into federal Court.

Respondents wish to emphasize that a ruling that the District Court properly exercised ancillary jurisdiction in the instant case would result in a radical expansion of that concept, and a departure from the decisions as cited both by petitioner and respondent.

For the reasons discussed above, the Petition for Writ of Certiorari should be denied, and the judgment of the Court of Appeals affirmed.

Respectfully submitted,

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